In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 522

MICHAEL JOSEPH LYNCH, PETITIONER

v.

LEWIS B. HERSHEY, DIRECTOR OF SELECTIVE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 5-6) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1953 (R. 7). The petition for a writ of certiorari was filed on January 6, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a draft registrant who had not as yet been arrested or indicted for failure to report for

induction could attack the validity of his classification by a petition for a writ of habeas corpus to the Director of Selective Service.

STATEMENT

Petitioner filed in the United States District Court for the District of Columbia a petition for a writ of habeas corpus, the substance of which is as follows (R. 2-3):

Petitioner is a resident of Dell City, Texas, where he is a 15% partner in a 62,000 acre farming venture. In 1948, because of the loss of a finger, he was classified 4-F by Local Board 93, Alhambra, California, while a student at the University of Southern California. When he entered the farming business in Texas in 1951 he was still classified 4-F. In October 1952 he was reclassified 1-A, and refused to report for induction into the armed services at El Paso, Texas, as ordered on April 17, 1953. Four days later, after voluntarily taking up residence at the Statler Hotel in Washington, D. C., he filed the habeas corpus petition in which he alleged that he was restrained of his liberty by respondent, Lewis B. Hershey, Director of Selective Service at Washington, D. C. He alleged that this restraint consisted of a threat of fine and imprisonment, after refusal to grant him a personal appearance before the California board, the right to have his appeal for agricultural deferment decided by an appeal board in Texas, the right to have his classification reconsidered to avoid injustice, and the right to be classified II-C as an agricultural employee, in ac-

cordance with certain designated selective service regulations.

After oral argument, the district judge denied the petition (R. 4). On appeal the judgment was unanimously affirmed (R. 7). The court below rejected as untenable petitioner's contention that the threat of imminent criminal prosecution for failure to report in response to the induction order constituted sufficient "constructive custody" to warrant issuance of the writ and pointed out that the instant case was not essentially different from any other where prosecution is threatened for failure to obey a lawful statute (R. 5-6).

ARGUMENT

The petition for habeas corpus was properly dismissed since it did not allege any physical restraint of petitioner. *McNally* v. *Hill,* 293 U. S. 131, 138; *Stallings* v. *Splain,* 253 U. S. 339, 343; *Wales* v. *Whitney,* 114 U. S. 564, 571-572. The allegation that petitioner's restraint consisted of a threat of fine and imprisonment by respondent, was manifestly insufficient. See *Biron* v. *Collins,* 145 F. 2d 758, 759 (C. A. 5), where the court said:

> [The registrant] has never been arrested, he is physically free to come and go, the members of the Local Board have no authority to imprison him and have not attempted to do so. He is not in their custody, nor can they in any lawful manner seize and produce his body in answer to the writ. All they have done or can do is to issue an order to him in the line of their

> duty. *It is true that if he disobeys, the law threatens punishment. The law constantly threatens imprisonment to anyone who does not obey its commands, but one is not for that reason entitled to examine the validity of the law by writ of habeas corpus.* [Emphasis added.]

In fact, petitioner did not allege any kind of restraint by respondent Director of Selective Service which would enable respondent to produce the body of petitioner in court in response to a writ. Petitioner's failure to report for induction made him a "delinquent" under the selective service regulations,[1] which require that "Every registrant who fails to comply with an Order to Report for Induction * * * shall be reported promptly to the United States Attorney * * *," [2] and "In no event shall the local board order or participate in the arrest of a delinquent." [3] Under the regulations, respondent is prevented from ordering or participating in the arrest of petitioner as a delinquent, that being the function of the United States Attorney. There is no allegation that the United States Attorney for the District of Columbia, the so-called place of confinement, has ordered any prosecution of petitioner.

Petitioner is of his own free will living in a hotel

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[1] 32 C.F.R. 1602.4 (1951 ed.) provides: "A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law."

[2] 32 C.F.R. § 1642.41 (a) (1951 Ed.).

[3] 32 C.F.R. § 1642.41 (b) (1951 Ed.).

of his choice far from his present residence and from the place of classification. Manifestly, this is not confinement by respondent.[4]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1954.

[4] The allegations of the habeas corpus petition did not bring it within Title 16-801, D.C. Code (1951 Ed.) as petitioner contends (See Pet. 5). There were no factual allegations sufficiently showing restraint of petitioner's liberty, or that petitioner was ever in the "custody" or "keeping" of respondent.

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